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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Case No. ____

HORIZONS APARTMENTS ASSOCIATES, LTD.
and CAL KOVENS,
Petitioners,

v.

LEE COUNTY, FLORIDA, a political
subdivision of the State of Florida,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

In August, 1977, Lee County, Florida determined to acquire right-of-way for and to construct a limited access highway, County Road 869. A binding resolution describing the road and fixing the location of its right-of-way was recorded in the Public Records. (APP. 32a) The Petitioners' property was unaffected by the course and location of the proposed road. In pursuance thereof the County validated, issued and sold bonds for the construction of this highway. Thereafter, in July, 1980, the County passed a resolution changing the course, location and description of said road (APP. 51a), which new location bisected the Petitioners' property. Pursuant thereto in 1981, the County instituted eminent domain proceedings including a declaration to take immediate possession and title to the affected portion of the Petitioners' property (APP. 7a). The Petitioners' defense by way of pleadings and evidence was founded upon a well-established principle enunciated by the Supreme Court of Florida that once a Board of County Commissioners described and located a road prior to validation and issuance of road construction bonds, it would not thereafter be permitted to deviate from the location as established. *Pirman* v. *Florida State Improvement Commission*, 78 So. 2d 718 (Fla. 1955). Disregarding this defense the Trial Court rendered its Order authorizing the County to immediately gain possession and title to Defendants' property which it had sought to condemn. (APP. 1a) Thereafter, on appeal to the District Court of Appeal of Florida, Second District, the Appellate Court refused to treat this principle of law established by the Supreme Court of Florida as applicable to the uncontested facts above outlined; and, through affirmance of the Trial Court by an Opinion consisting of only one word "Affirmed" it thereby effectively denied to the Petitioners the right to present their case for conflict

review to the Supreme Court of Florida under applicable constitutional and procedural provisions. Is this Judgment of the Appellate Court state action which denies to the Petitioners the due process of law and the equal protection of law under the Fourteenth Amendment to the Constitution of the United States?

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v.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

OPINIONS OF THE COURT

1. Opinion of the Circuit Court of the 20th Judicial Circuit in and for Lee County, rendered on August 17, 1981, unreported, set forth verbatim in APP. 1a.

2. Opinion of the District Court of Appeal of Florida, Second District, a verbatim copy of which is attached at APP. 56a.

3. Order Denying Motion for Rehearing of the District Court of Appeal of Florida, Second District, unreported, verbatim transcript at APP. 61a.

4. Opinion of the Supreme Court of Florida, unreported a verbatim transcript is set forth at APP. 62a.

BASES OF FEDERAL JURISDICTION

Jurisdiction in support of this Petition for Writ of Certiorari is based upon 28 U.S.C.A. § 1257(3). The date of the Opinion and Judgment of the District Court of Appeal of Florida, Second District, sought to be reviewed were filed on February 17, 1982, (APP. 56a [which became effective and final upon denial of the Motion for Rehearing on April 16, 1982] as augmented by its Order denying Motion for Rehearing dated April 16, 1982, (APP. 61a), confirmed by Supreme Court of Florida Order of Dismissal dated May 18, 1982, (APP. 62a)

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

The Constitution of the State of Florida, Article V, Section 3(b)(3); Florida Rule of Appellate Procedure 9.030(a)(2)(A)(IV).

"Section 3. Supreme Court.—

• • • • •

(b) JURISDICTION.—The supreme court:

• • • • •

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

"Rule 9.030. Jurisdiction of Courts

• • • • •

(2) Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:

(A) decisions of district courts of appeal that:

• • • • •

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law; . . ."

By this state action (expressly pointed out in Petitioners' Motion for Rehearing at the District Court of Appeal [APP. 57a]) the District Court of Appeal, Second District, denied the Petitioners due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Amplification of the special and important reasons which Petitioners rely upon for allowance of the writ appear infra, page 10 *et seq.*

STATEMENT OF THE CASE AND FACTS

In this case, the Board of County Commissioners of Lee County, Florida, (hereinafter also referred to as "The County" or "County Commission"), described and specifically located a proposed new road by formal action and official records, *prior to*, the validation and issuance of road construction bonds. *Thereafter*, it sought to change and deviate from the location as formally and officially established.

Following prolonged local debate and public hearings, Lee County, Florida, determined to build County Road 869 (CR 869) as a limited access, high speed facility, in a specific location for a defined distance along an essentially straight course in Lee County, Florida.

In accordance with Resolution No. 77-8-26, dated August 31, 1977 (APP. 32a), the County approved an Official Map of Location and Survey, and, further, pursuant to

said resolution, the Official Map of Location and Survey was filed July 14, 1977. (APP. 34a)

To finance construction of CR 869, inter alia, issuance and sale of certain Lee County, Florida, bonds were authorized by Lee County Resolution No. 78-8-20, passed August 16, 1978. (APP. 38a) Pursuant thereto, in bond validation proceedings, County Engineer C. M. Carroll (through testimony at APP. 39a) and a map which he demonstrably used (APP. 42a) confirmed the proposed specific location, distance and straight design of CR 869 as adopted by the County Commission (APP. 34a) and relied upon in the bond validation proceedings. (APP. 39a-42a) The successful County Road bond validation proceedings were affirmed in the Florida Supreme Court sub. nom, *Doane* v. *Lee County*, 376 So. 2d 852 (Fla. 1979).

Subsequently, after *validation, issuance and sale* of the road construction bonds, the Lee County Commission attempted to severely alter and modify a portion of CR 869 by Resolution passed July 9, 1980,—almost three years after the road location was first fixed. (APP. 51a) A new, revised Map of Location and Survey was filed July 15, 1980, (APP. 55a), purporting to supersede the Official Map upon the basis of which the road construction bonds were issued.

Nowhere does it appear that notice of any impending change was provided to purchasers of the Lee County Road Bonds.

Pursuant to the County's revised Map of Location and Survey and Resolutions attached to the Petition in Eminent Domain, Lee County initiated condemnation proceedings to acquire the Petitioners' lands for the new portion of the relocated and revised CR 869 right-of-way.

The Paramount Issue Of This Condemnation Proceeding Is Immediately Observable By Brief Comparison Of The First Map Of Location Dated July 14, 1977, (APP. 34a) On Which The Bonds Were Validated With Revised Location Map Dated And Filed Almost Exactly Three Years Later, July 15, 1980. (APP. 55a)

The Petitioners' property, untouched by the original location and alignment (for which all needed land had been donated) is bisected and destroyed by the eminent domain proceedings brought to condemn additional property for the severely revised alignment of CR 869.

Col. Benjamin C. Pratt, longtime Director of Lee County's Division of Administration and Public Works, testified at trial that from the standpoint of engineering the revised road design was not necessary. (APP. 43a)

There appears no legitimate dispute that the revised post-bond validation/sale revised County Road right-of-way results in the following changes:

TYPE AND DESCRIPTION:	From a straight north-south road at a planned speed of 55 mph, changed to a double-reverse super-elevated curved road on which speed must be reduced to 45 mph.
LENGTH:	Changed the location of the proposed right-of-way and added approximately one-half (1/2) additional miles of curved road.
COST:	Change of location with inclusion of double-reverse super-elevated curve adds approximately two to three million dollars in additional road costs.

In the County Eminent Domain Proceedings brought below to condemn the Petitioners' lands, (APP. 7a), all the foregoing facts were alleged in the defendant's answer. (APP. 24a) Moreover, as a defense the trial court was directed to the established principle of law, as the same had been enunciated by the Court of last resort in Florida, that the County Commission was without authority to change the location and alignment of C.R. 869 *after* the road construction bonds had been validated, issued and sold. *Pirman* v. *Florida State Improvement Commission*, 78 So. 2d 718 (Fla. 1955).

The Circuit Court (trial court) declined to apply (as it was bound to do under the law of Florida, *State* v. *Lutz*, 286 So. 2d 565 [Fla. 1973]), the principle enunciated by the Supreme Court of Florida as aforesaid, and entered its Order authorizing the County to immediately seize and possess the defendant's property which it had sought to condemn. (APP. 1a).

FEDERAL QUESTION FIRST ARISES

On appeal from the Order or Judgment of the trial court authorizing immediate seizure and possession of Petitioners' property, the District Court of Appeal of Florida, Second District, disallowed oral argument, declined and refused to apply the law of Florida above stated, as it too was bound to do (*Gilliam* v. *Stewart*, 291 So. 2d 593, 594 [Fla. 1974]; *Hoffman* v. *Jones*, 280 So. 2d 431, 434 [Fla. 1973], and summarily affirmed the Circuit Court by simply declaring "PER CURIAM. Affirmed." (APP. 56a). No further opinion or discussion was provided. It was this action that precipated the federal question, and thus Petitioners' first opportunity presented the same by Motion for Rehearing which brought into sharp focus the federal question. A timely Motion for Rehearing was filed on

March 2, 1982, the Motion being denied on April 16, 1982. The federal question which thus first emerged was presented as follows:

> "The essential facts of this case are identical with the facts of the case of Pirman v. Florida State Improvement Commission, 78 So. 2d 718 (Fla., 1955). In that case the Supreme Court of Florida squarely held:
>
> > [3] The Board of County Commissioners may, however, describe the road or locate the road prior to validation and issuance of the bonds, and when that is done, the Board will not be permitted to deviate from the location as established.'
>
> The affirmance of the trial court in this case is a decision directly in conflict with the holding and decision in the *Pirman case*, supra. Consequently, the District Court of Appeal of Florida, Second District, through the affirmance of the trial court merely by the use of the word, "affirmed," has unintentionally but effectively denied the Appellant due process and equal protection of law because by the use of that word. *Jenkins* v. *State, 385 So. 2d 1356 (Fla. 1980)* and *Dodi Publishing Company* v. *Editorial America, S.A., 385 So. 2d 1359 (Fla. 1980)*, destroyed the Appellant's right to present its case to the Supreme Court of Florida under applicable constitutional provisions conferring Supreme Court conflict jurisdiction. Thus, the District Court of Appeal of Florida, Second District, by State action, has denied to the Appellant due process of law and equal protection of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

GROUND I

The District Court of Appeal, Second District, in its decision in the above entitled cause overlooked and failed to consider that when an avenue of appeal or appellate review has been extended under limited

circumstances by the Constitution of the State of Florida, this limited right 'cannot be granted to some litigants and capriciously and arbitrarily denied to others without violating the equal protection clause' of the Constitution of the United States. *Lindsey* v. *Normet, 405 U.S. 59, 92 S. Ct. 862, 876 (1971).* Thus, destruction of Appellant's right to seek and procure a review of the decision of the District Court of Appeal, Second District, upon the ground of conflict jurisdiction by simply using the word 'affirmed,' rather than recognizing and treating in said decision with the direct conflict between the Circuit Court decision and the decision of the Supreme Court of Florida on the same question of law in the case of *Pirman* v. *Florida Improvement Commission, supra*, constitutes State action, which can be utilized to grant to some litigants and capriciously or arbitrarily deny to others the right of review in violation of the equal protection clause of the Constitution of the United States. Such action 'is to be regarded as action of the State within the meaning of the Fourteenth Amendment." See *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill, 281 U.S. 673, 50 S. Ct. 451,* and *Shelly* v. *Kraemer, 334 U.S. 1, 68 S. Ct. 836.* And, the Constitution of Florida, Article V. Section 3(b)(3), grants to this Appellant the right to present for review to the Supreme Court of Florida 'any decision of the District Court of Appeal that expressly and directly conflicts with a decision . . . of the Supreme Court on the same question of law.' Such right under such circumstances is a part of the appellate due process of law.

GROUND II

The District Court of Appeal, Second District, overlooked and failed to consider that where the right of appeal or appellate review has been extended under limited circumstances by the Constitution of the State of Florida, 'there may not be imposed upon it discriminatory limitations which

violate the right of the equal protection of the law' under the provisions of the Fourteenth Amendment to the Constitution of the United States. Thus, the destruction of Appellant's right to seek and procure review of a decision of th. District Court of Appeal, Second District, upon the ground of conflict jurisdiction by simply using the word 'affirmed' rather than recognizing and treating with the direct conflict between the Circuit Court decision and the decision of the Supreme Court of Florida on the same question of law in the case of *Pirman* v. *Florida State Commission*, *supra*, constitutes State action imposing a discriminatory limitation upon the Appellant's right, as aforesaid, in violation of the equal protection clause of the Constitution of the United States, Article XIV, Section 1.

WHEREFORE, the Appellant respectfully moves and urges that this Court reconsider and recall the 'Per Curiam Affirmed' opinion, issued herein, substituting therefor this Court's express decision upon the merits of the matter sub judice." (APP. 57a)

Appellants' request for oral argument and Motion for Rehearing in which the federal question first emerged were by the same order denied. (APP. 61a)

Petitioners sought remedy of review of the Supreme Court of Florida (notwithstanding the District Court of Appeal defect) by filing its Notice to Invoke Discretionary Jurisdiction upon grounds of conflict. This was summarily and predictably dismissed, for lack of jurisdiction (APP. 62a), on authority of *Jenkins* v. *State*, 385 So. 2d 1156 (Fla. 1980) which had held:

"the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion . . . when the basis for such review is an alleged

> conflict of that decision with a decision . . . of the Supreme Court . . ."
>
> *Jenkins* v. *State*, supra, at 1359.

From the Opinion and Judgment of the District Court of Appeal of Florida, Second District, filed February 17, 1982, (APP. 56a [which became effective and final upon denial of the Motion for Rehearing on April 16, 1982]), as augmented by its Order denying Motion for Rehearing dated April 16, 1982, (APP. 61a), confirmed by the Supreme Court of Florida Order of Dismissal dated May 18, 1982, (APP. 62a), this Petition for Writ of Certiorari is sought.

ARGUMENT

Pursuant to Constitution of the State of Florida, Article V, Section 3(b)(3) and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), litigants are permitted the right to seek discretionary review of District Court of Appeals' decisions that "*expressly* and *directly* conflict" with a decision of the Supreme Court of Florida on the same point of law. Where, however, the District Court fails or refuses to *expressly* provide an opinion reflecting the basis of its decision, the right of such conflict review jurisdiction is instanter extinguished. Thus, where, as here, a District Court opinion simply asserts affirmance by the use of the single word "Affirmed," in such arbitrarily selected instances the offended party's substantive and procedural right to the full exhaustion of due process by completing the appellate ladder is snuffed out. As pointed out by the Supreme Court of Florida's Order of Dismissal for lack of jurisdiction (APP. 62a):

> "The Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district

> courts of appeal of this state rendered without opinion . . . when the basis for such review is an alleged conflict of that decision with a decision . . . of the Supreme Court."
>
> *Jenkins* v. *State*, 385 So. 2d 1356, 1359 (Fla. 1980).

That the invidious fact of denying litigants the right to full range of appellate remedies in conflict situations by the seemingly capricious and arbitrary selection of a single word "Affirmed" has become pervasive, may be observed from the recent opinion rendered by another District Court of Appeal of Florida (There are a total of five) which was prompted to declare:

> "For the information and benefit of the attorneys and their clients, I shall not render a per curiam affirmed opinion hereafter.
>
> First, I shall sign all opinions in cases assigned to me for primary responsibility.
>
> Second, I shall write a short opinion in each case assigned to me and shall tersely give the reason for affirming each issue raised by the appellant or cross appellant.
>
> I hope that this action by me will answer the frequent complaints about per curiam affirmed decisions. The attorneys and their clients will generally know why their cases are affirmed. The possible remedies from adverse decisions will be preserved for consideration by the Supreme Court."
>
> *Davis* v. *Sun Banks of Orlando*,
> 412 So. 2d 937 (Fla. 1st DCA 1982)

Further illustrative of the intolerable spectre of the District Court of Appeal's seemingly unqualified discretion to designate which litigants may further pursue the appellate process by its arbitrary selection of who shall

receive an "express decision" and who shall only be "affirmed" is a case such as this in which the facts are virtually admitted and all that remains is the correct application of a well-established principle of law. In *Matthews* v. *Metropolitan Life Insurance Company*, 89 So. 2d 641, 642 (Fla. 1956), the Supreme Court of Florida opined:

> ". . . we have the view that the duty of a trial judge to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have had the "remedy, by due process of law," guaranteed by Section 4 of the Declaration of Rights of our Constitution, if the trial judge fails or refuses to perform that duty . . . and, in deed, it is unthinkable that this Court in the exercise of its supervisory jurisdiction over other courts, could not compel adherence to a principle of law heretofore established."

And the District Court of Appeal of Florida, First District, likewise declared:

> "It seems to be the settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of judicial process that litigant cannot be said to have had the remedy by due course of law guaranteed by Section 4 of the Declaration of rights of our Constitution, if the judge fails or refuses to perform that duty."
>
> *State of Florida* v. *Smith*,
> 118 So. 2d 792, 795
> (Fla. App. 1960)

Accordingly, any rule which, as here, in its application leaves absolutely to the District Court of Appeal, the full right to invoke and apply by capricious and arbitrary methods the technique by which a case be resolved and

thus to absolutely foreclose further right to review must clearly be deemed a deprivation of substantive and procedural due process of law and equal protection of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Such laxness and inexactness in a delegation of power is condemned by the Supreme Court of Florida as ". . . in violation of the guarantees of the State and United States Constitutions." *Drexel* v. *City of Miami Beach*, 64 So. 2d 317, 319 (Fla. 1953). The District Court of Appeal of Florida, Second District, was bound and required to follow the case law set forth by the Supreme Court of Florida in *Pirman, supra*. See *Hoffman* v. *Jones*, 280 So. 2d 431 (Fla., 1973). It is the petitioner's right to insist that the District Court of Appeal of Florida, Second District, follow the *Pirman case, supra*. This right should not be denied simply by the execution of a form of judgment by the Appellate Court, which prevents any inquiry of this conduct by the Supreme Court of Florida. Obviously, conflict jurisdiction immediately would arise if the District Court of Appeal of Florida, Second District, had cited the Pirman case, supra, and announced that it declined to follow the principles enunciated by the Supreme Court of Florida therein. This is plain State action which denies to the Petitioners the equal protection of the law and due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

This problem is now acute in the State of Florida. This is demonstrated by the opinion in the Davis case, supra, decided by the District Court of Appeal of Florida, First District. This is pointed up by the dissenting opinion in the *Jenkins case, supra*.

We respectfully suggest that this is a matter of great importance, and we respectfully suggest that jurisdiction should be assumed in this case for a determination of this important question or else it appears evident that many Petitioners will seek the same relief from the Supreme Court of the United States because of this denial of due process of law and the equal protection of the law by the appellate procedure adopted in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that 3 copies of the Petition for Writ of Certiorari together with 3 copies of the Appendix was furnished by mail to the following on this 14th day of July, 1982:

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Assistant Lee County Attorney
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MARION E. SIBLEY
Counsel of Record for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Case No. _____

HORIZONS APARTMENTS ASSOCIATES, LTD.
and CAL KOVENS,

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LEE COUNTY, FLORIDA, a political
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APPENDIX

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IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL ACTION

Case No. 81-1747 CA-RTS

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

v.

HORIZONS APARTMENTS ASSOCIATES, LTD.; CAL KOVENS; WYOMI GREENS, LTD.; and DICK STEELE, in his capacity as Tax Collector in and for Lee County;

Defendants.

August 18, 1981

ORDER OF TAKING

THIS CAUSE, coming on to be heard by the Court and, it appearing that proper notice was first given to all Defendants and all persons having or claiming any equity, lien, title or other interest in or to the real property described in the Petition that Petitioner would apply to this Court on the 7th day of August, 1981, for an Order of Taking, and the Court being fully advised in the premises upon consideration, it is, therefore,

ORDERED AND ADJUDGED:

1. That the Court has jurisdiction of the subject matter of the parties to this cause;

2. That the pleadings in this cause are sufficient and the Petitioner is properly exercising its delegated authority;

3. That the Petitioner acted in good faith, did not exceed its authority, and did not abuse its discretion;

4. That the project or improvement known as C.R. 869 is a limited access facility and is necessary;

5. That it is necessary to take the property described in the Petition;

6. That it is necessary to take the interest in the property described in Exhibit "A";

7. That as described in the Petition, the property is being acquired for use as a limited access road to be known as County Road 869, including such interests as are needed for the maintenance and construction thereof including, but not limited to, drainage and maintenance easements and that such use is a public purpose;

8. That the estimate of value in this cause made by the Petitioner was made in good faith and based upon valid appraisals;

9. That the Petitioner is entitled to possession of the following-described property prior to the entry of Final Judgment, to-wit:

(See attached Exhibit "A")

Upon payment to the Registry of this Court, the deposit hereinafter specified; and that said deposit of money will fully secure and fully compensate the persons lawfully entitled to compensation, as will be determined ultimately by final judgment of the Court, and which said sum of money to be deposited is in no instance less than the value of said land, and fixed by the estimated value as set by the Petitioner as follows:

Parcel No. 2 - $110,200.00

PROVIDED, FURTHER, that the sum of money in the total amount of One Hundred Ten Thousand Two Hundred Dollars ($110,200.00) shall be deposited in the Registry of this Court within twenty (20) days after the date of this Order. and upon making such deposit, the Petitioner shall notify in writing all attorneys of record and those Defendants not represented by counsel that the deposit has been made, and that on that day

of deposit the Petitioner shall be entitled to possession of the property described in Exhibit "A" without further notice or order of this Court.

If the Petitioner shall default in the depositing of said sum of money within the time provided, this Order shall be void and of no further force or effect.

DONE AND ORDERED in Fort Myers, Lee County, Florida, on this 17th day of August, 1981.

/s/ Robert T. Shafer
ROBERT T. SHAFER, Circuit Judge
Twentieth Judicial Circuit
in and for Lee County, Florida.

FEE SIMPLE INTEREST

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Contains 1.586 acres

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A 20 foot wide strip of land (as measured on a perpendicular) lying adjacent to the Southeasterly right-of-way line of CR-869 between Station 312 + 85.00 and Station 318 + 80 and a 20 foot wide strip of land (as measured on a perpendicular) lying adjacent to the Northwesterly right-of-way line of CR-869 between Station 312 + 30.00 and Station 319 + 40.00, as

shown on right-of-way maps accepted by Lee County Board of County Commissioners on October 1, 1980, for the construction and maintenance of slopes as shown on Construction Plans furnished by Flood Associates, Inc. dated November 1980.

Contains 25,940 ± square feet or .6 ± acres.

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ALSO

Commencing at the Southwest corner of the Southeast quarter of the Northwest quarter of said Section 11; Thence N 0° 42' 34'' W for distance of 725.99 feet; Thence N 89° 08' 49'' E for distance of 159.95 feet to the point of beginning. From said point of beginning go Northeasterly along the arc of a curve to the right for distance of 303.72 feet to point of tangency. Said curve having a radius of 904.93 feet, chord length of 302.29 feet, chord bearing N 53° 28' 12'' E; Thence N 63° 05' 06'' E for distance of 275.33 feet; Thence S 0° 12' 42'' E for distance of 22.39 feet;

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IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL ACTION

Case No. 81-1747 CA-RTS

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

v.

HORIZONS APARTMENTS ASSOCIATES, LTD.; CAL KOVENS; WYOMI GREENS, LTD.; and DICK STEELE, in his capacity as Tax Collector in and for Lee County;

Defendants.

PETITION IN EMINENT DOMAIN

Petitioner, LEE COUNTY, FLORIDA, a political subdivision of the State of Florida, sues each of the Defendants named and set forth in Exhibit "A" attached hereto and made a part hereof, and alleges:

1. This is an action in eminent domain to condemn certain property lying, being, located and situated in Lee County, Florida.

2. Petitioner is exercising its rights of eminent domain by virtue of the authority granted to it by Chapters 73, 74, 125 and 127, Florida Statutes, as amended, and further by virtue of the certain Resolution duly and regularly adopted by the BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, a true copy being attached hereto as Exhibit "B". Petitioner has authorized the use of this power to acquire the property described in Paragraph 5 hereof.

3. Said property hereinafter described is being acquired for use as a limited access road to be known as County Road 869, including such interests as are needed for the maintenance and construction thereof including, but not limited to, drainage and maintenance easements.

4. Said property hereinafter described is necessary for the use described in Paragraph 3 above.

5. A description identifying the property sought to be acquired is as follows, to-wit:

(See Exhibit "C" attached hereto)

6. The estate or interest sought to be acquired by these proceedings is a fee simple interest and construction maintenance easement as described in Exhibit "C" for the above-described public use or purpose.

7. There is not located on the above-described property a mobile home or trailer.

8. The Petitioner has made diligent search and inquiry to discover names, residences, and legal disabilities, if any, and interests in the property of all owners, lessees, mortgagees, judgment creditors, lienholders, persons in possession and all persons having or claiming to have any interest in said property and the same is particularly set forth as follows:

(See Exhibit "A" attached hereto) and to all of the foregoing Defendants, if said Defendants are living, and if any or all of said Defendants are deceased, the unknown spouse, heir, devisee, grantee, creditors, lienors, or other parties claiming by and through, under or against any such deceased Defendant or Defendants, if alive, and if dead their unknown spouse, heir, devisee, grantee, creditor, lienor or other parties claiming by and through, under or against any such deceased Defendant or Defendants, and all parties having or claiming to have any right, title or interest in the property described in these proceedings who are unknown to the Petitioner.

9. The Petitioner has surveyed and located its line or area of construction, and intends in good faith to construct the project on or over the property described in this Petition.

10. Petitioner is authorized to take possession and title in advance of entry of Final Judgment in eminent domain actions, and its Declaration of Taking is filed herewith.

WHEREFORE, Petitioner demands:

a. That the property described in this Petition be condemned and taken by the Petitioner for the uses and purposes set forth in this Petition and that the interests sought by this Petitioner in said property, as set forth in the Petition, be vested in the Petitioner.

b. Trial by jury on all matters triable as a matter of right by a jury.

c. That the jury be required to view the property.

d. That a hearing be held on Petitioner's application for an Order of Taking and that Petitioner be granted possession and title in advance of Final Judgment pursuant to Florida Statute, Chapter 74.

DATED: May 13, 1981.

OFFICE OF THE COUNTY ATTORNEY,
IN AND FOR LEE COUNTY, FLORIDA
Attorneys for Petitioner
Post Office Box 398
Fort Myers, Florida 33902
(813) 335-2236

/s/ Terry F. Lenick
TERRY F. LENICK,
Assistant County Attorney

EXHIBIT A

Interestholder	Interest
Horizons Apartments, Associates, Ltd.: a Florida Limited Partnership (Address and general partners unknown)	Fee Simple
Cal Kovens, Trustee, 1301 Dade Blvd. Miami Beach, Fla. 33139	Fee Simple
Wyomi Greens, Ltd., a Florida Limited Partnership, Theodore A. Kulhan, General Partner 4632 Seminole Fort Myers, Florida 33902	Mortgagor
Dick Steele, as Tax Collector in and for Lee County, Florida 2115 Second Street Fort Myers, FL 33901	

RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA
Resolution No. 80-7-5

WHEREAS, pursuant to due authorization, the Lee County Division of Transportation has had County Road 869 located and surveyed and has prepared an alignment for said road from Canal L of the IDD System easterly around the Tanglewood School to Colonial Boulevard; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida held a public hearing on July 9, 1980 to consider approving said alignment; and,

WHEREAS, after hearing from all concerned persons present at said public hearing, it is the desire of the Board to approve said alignment;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, that it hereby approves the alignment of County Road 869 from Canal L of the IDD System easterly around the Tanglewood School to Colonial Boulevard, as shown on the map prepared by the Lee County Division of Transportation, and approves the location and the survey of the alignment as shown on the map of Survey and Location of County Road 869, which map supersedes that portion of the official map of Location and Survey of a portion of S.R. 869 between P.C. Sta. 298 + 42.54 north of Canal L and P.T. Sta. 383 + 51.30 at Colonial Boulevard as recorded in Map Book "C", page 10 on the 14th day of July A.D. 1977, and the Board of County Commissioners directs that a copy of said map, certified by the Director of the Lee County Division of Transportation be filed in the office of the Clerk of the Circuit Court of Lee County; and,

BE IT FURTHER RESOLVED that it is the judgment of the Board of County Commissioners of Lee County that the construction of said County Road 869 is necessary, practical and to the best interest of the county, and that it is necessary that the right-of-way for the roadbeds and borrow pits for said

C.R. 869 be acquired in fee simple and a perpetual easement shall be acquired for Drainage Ditches; and the county is authorized to acquire the same by gifts, purchase, or condemnation; and,

BE IT FURTHER RESOLVED by the Board of County Commissioners that the County Attorney's Office and the Division of Transportation are hereby authorized to secure by gift, purchase or condemnation the lands necessary for the right-of-way for the roadbed for said County Road 869 as shown on the official right-of-way map, together with any and all borrow pits and easements for drainage ditches that may hereafter be found and determined necessary in the construction and maintenance of County Road 869, said land to be free of legal and physical encumbrances.

THE FOREGOING RESOLUTION was offered by Commissioner Rodda, who moved its adoption. The motion was seconded by Commissioner Taylor, and upon being put to a vote, the vote was as follows:

R. DOUG TAYLOR	AYE
HARRY RODDA	AYE
ROLAND Q. ROBERTS	AYE
WADE SCAFFE	AYE
RICHARD L. STEELE	AYE

DULY PASSED AND ADOPTED by the Board of County Commissioners of Lee County, Florida, this 9th day of July, A.D. 1980.

ATTEST:
/s/ Sal Geraci
SAL GERACI, Clerk

APPROVED AS TO FORM
/s/ ?????
Office of County Attorney

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY FLORIDA

/s/ R. L. Steele
R. L. STEELE, Chairman

RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA
Resolution No. 81-4-35

WHEREAS, the Board of County Commissioners of Lee County, Florida, desires to exercise its right to condemn property for public use or purpose and that the property to be condemned is necessary for that use; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida, adopted Resolution No. 80-7-5 which approved the alignment of County Road 869 from Canal L of the IDD System easterly around Tanglewood School to Colonial Boulevard and further resolved that the County Attorney's Office and the Division of Transportation were thereby authorized to secure by gift, purchase or condemnation the lands necessary for the right-of-way, together with any and all borrow pits and easements for drainage ditches that may thereafter be found to be determined necessary in the construction and maintenance of County Road 869; and,

WHEREAS, having failed to acquire certain property within this alignment and right-of-way by gift or purchase.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, that:

SECTION ONE

Use, Necessity, And Description Of Property

The Board finds that the property described in the attached Exhibit C is necessary and being acquired for the following public use or purpose:

The construction and maintenance of a limited access road to be known as County Road 869 as depicted on the alignment and right-of-way maps; including such borrow pits, drainage easements or other property interests as are needed for the construction and maintenance of the road.

SECTION TWO

Authority And Estate

By virtue of the authority granted to the Board of County Commissioners of Lee County by Chapters 73, 74, 125 and 127, Fla. Stat., and all other statutory or common law which shall grant to the Board the power to institute and proceed with acquiring property under the exercise of the power of eminent domain, the Board hereby authorizes and directs the County Attorney's Office to commence and prosecute any and all proceedings necessary to acquire in fee simple and as a construction and maintenance easement the property respectively described in Exhibit "C" for the above-described public use or purpose.

The forgoing Resolution was offered by Commissioner Averill who moved its adoption. The motion was seconded by Commissioner Roeder and, upon being put to a vote, the vote was as follows:

ROLAND "RO" ROBERTS	AYE
ERNIE AVERILL	AYE
HARRY E. RODDA	ABSENT
WADE H. SCAFFE	AYE
MIKE ROEDER	AYE

DULY PASSED AND ADOPTED this 29th day of April, 1981.

ATTEST:
/s/ Sal Geraci
SAL GERACI, Clerk

/s/ Lois Kurtz
LOIS KURTZ, Deputy Clerk

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

/s/ Roland D. Roberts
ROLAND D. ROBERTS, Chairman

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Defendants.

ANSWER AND RESPONSE OF DEFENDANTS, HORIZONS APARTMENTS ASSOCIATES, LTD., AND CAL KOVENS TO PETITION IN EMINENT DOMAIN AND SHOW CAUSE ORDER

COME NOW the Defendants, HORIZONS APARTMENTS ASSOCIATES, LTD. and CAL KOVENS, and file this their Answer and Response to the Petition in Eminent Domain and Rule to Show Cause heretofore issued, and for such response, these Defendants aver:

1. These Defendants admit the allegations of paragraph 1 of the Petition in Eminent Domain.

2. These Defendants deny the allegations of paragraph 2 and specifically aver that the resolution attached to the Petition as Exhibit "B" does not lawfully authorize the institution of these eminent domain proceedings and does not activate any of the powers conferred upon a County Commission by Chapters 73, 74, 125 and 127 of the Florida Statutes, as amended.

3. These Defendants deny that the property described in the petition is lawfully sought by the Petitioner for use as a limited access road known as County Road 869. These Defendants further deny that their interest in the property described is needed for the maintenance and construction of the alleged road.

4. These Defendants deny the allegations of paragraph 4 of the Petition in Eminent Domain, and deny that the property described is necessary for the use described in paragraph 3 of the said Petition.

5. These Defendants admit that the property described in Exhibit "C" is property which belongs to these Defendants. These Defendants specifically aver that said property is not needed for the construction of County Road 869.

6. These Defendants admit that the said Petition seeks to acquire a fee simple interest in the property described in Exhibit "C". These Defendants deny, however, that said property is needed for public use or for a public purpose.

7. These Defendants admit the allegations of paragraph 7 of the Petition in Eminent Domain.

8. These Defendants are without knowledge as to the allegations of paragraph 8 of the Petition in Eminent Domain.

9. These Defendants deny the allegations of paragraph 9 of the Petition in Eminent Domain, and they specifically deny that the petition brought by the Petitioner is instituted and is maintained in good faith.

10. These Defendants deny the allegations of paragraph 10 of the Petition in Eminent Domain.

11. The Petitioner, acting by and through the County Commission of Lee County, Florida, seeks to condemn these Defendants' property for an ulterior reason and purpose and is clearly guilty of an abuse of discretion in seeking to condemn the said property in accordance with the survey or alignment of said County Road 869 as designated in said Petition and as shown by the description of the property.

On the 31st day of August, 1977, the County Commission of Lee County, Florida, conducted a public hearing to determine an appropriate and proper alignment of County Road 869, and at a full public hearing at which a number of experts were sworn and testified the said County Commission exercised its discretion and judgment in fixing the alignment for said road as shown by a Resolution of said County Commission by which said alignment was adopted. Thereupon, a map or plat of said alignment together with said resolution were filed of record among the public records of Lee County, Florida, in order that all persons and the public generally would be fully advised and would be fully put on notice of the alignment that the County Commission had determined was the appropriate, the most economical, the most direct, and the most suitable for the construction of said County Road 869. A true copy of said resolution together with the map or plat adopted thereby are hereto attached, marked Exhibit "1" and made a part hereof.

Thereafter, on the 25th day of October, 1978, the Petitioner filed its complaint seeking to have the Court validate revenue bonds to be issued by the County and to be sold to raise funds, which in part would be expended for the construction of said County Road 869, in accordance with the alignment adopted by the County Commission, as aforesaid. Upon the trial of the validation proceedings the County put in evidence the map or plat and survey of said alignment in order to show the exact project which was to be financed from the proceeds of the said bonds. Upon consideration of the evidence adduced before the Court, including the established alignment of said road, the Court validated said bonds and the same were thereafter sold for the purpose of constructing the said road as delineated on said map or plat then a part of the record in said validation proceedings. The property necessary for the construction of said road had been donated by property owners to the County, and the County owned the complete right of way for the construction of said road in accordance with said alignment then of public record in Lee County, Florida. No part of the funds of said bond issue were required to condemn and purchase prop-

erty for the construction of the said road according to said map and survey and said alignment.

These Defendants were the owners of approximately 10 acres of land, and their precedessor in title had donated a part of said land for the construction of said road, pursuant to said alignment. The balance of said land was to be utilized by these Defendants for the construction of a public housing project, which was approved by the City of Ft. Myers, Florida, and which was to be located within the limits of said City. The City has determined as a matter of public policy that the said housing was needed and had advised the Federal Government of its approval of the construction of said project and had vouched for the public necessity for the construction thereof within the City. Said project was approved in January, 1980, over the protest of the Petitioner. The Petitioner, in order to defeat the construction of said housing project, attempted to change the alignment of said road so that it would pass over the center of these Defendants' property, thereby rendering it impossible for these Defendants to construct said project. To the end of accomplishing this unlawful purpose, the Petitioner, on July 9, 1980, adopted a resolution changing said alignment so that instead of being a straight and direct road it would become a road with a large curve in it. This was the only means by which the County could effectively thwart these Defendants' construction of the said public housing project. A true copy of said resolution is attached to the Petition and is marked as Exhibit "B". This departure from the approved alignment rendered the said road a more dangerous and hazardous thoroughfare for vehicular traffic, increased the length of the road, and increased the cost of the construction of the road by more than $1,500,000.00. In addition thereto, the County is required to condemn property and pay the purchase price therefor, which was not required by the alignment which was a matter of record at the time of the validation of the bonds, as aforesaid.

There was no change in the area from the day of the adoption of the original alignment and the day of the attempted change in said alignment, and there were no economic factors nor

physical features of the land which had changed which would make it more beneficial to adopt the alignment indicated by the Petition in Eminent Domain.

Road 869 was originally planned as a State Road and the Department of Transportation had adopted as the appropriate alignment the one indicated by the survey and resolution of the 31st day of August, 1977. Moreover, the County Engineer of Lee County, Florida, has publicly expressed the opinion that the said alignment of August 31, 1977, is preferable to the alignment sought in said Petition in Eminent Domain. Moreover, the Petitioner is estopped to change the said alignment because the Petitioner has represented to the Court in the validation proceedings that the project to be built from the funds derived from the said bonds was that project indicated by said resolution and survey adopted by the County, as aforesaid.

WHEREFORE, these Defendants charge that the condemner is not acting in good faith and that it has abused its discretion, for that, it has found that the alignment adopted August 31, 1977, is available and more beneficial to the County. It knows that the attempted change in the alignment will increase the cost by $1,500,000.00, and it is fully aware that safety considerations require that no change should be made from the alignment of August 31, 1977. The failure and refusal of the condemning authority to properly weigh these factors constitutes gross abuse of discretion, and the Court should

deny to the Petitioner the authority to condemn in accordance with the alignment and survey of July 9, 1980.

NUCKOLLS, PARSONS, JOHNSON AND FERNANDEZ
P.O. Box 729
Ft. Myers, Florida 33902
Telephone: (813) 334-3400

/s/ Hugh Paul Nuckolls
HUGH PAUL NUCKOLLS
(Of Counsel)

JOHN R. FARRELL, ESQ.
2825 South Miami Avenue
Miami, Florida 33129

-AND-

SIBLEY, GIBLIN, LEVENSON & GLASER
P.O. Box 398479
Miami Beach, Florida 33139
Telephone: (305) 538-1461

/s/ Marion E. Sibley
MARION E. SIBLEY
(Of Counsel)

ATTORNEYS FOR DEFENDANTS HORIZONS APARTMENTS ASSOCIATES, LTD and CAL KOVENS

STATE OF FLORIDA
COUNTY OF DADE
SS:

BEFORE ME, the undersigned authority, this day personally appeared PHILLIP SLOANE, who, after first being duly cautioned and sworn, deposes and says that he has read the above and foregoing Response and Answer and that the statements set forth therein are true to the best of his knowledge.

/s/ Phillip Sloane
PHILLIP SLOANE

Sworn to and subscribed to before me this 14th day of June, 1981, at Miami Beach, Dade County, Florida.

/s/ Patsy J. Baeven
PATSY J. BAEVEN
Notary Public, State of Florida at Large

My Commission Expires: August 24, 1981

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the above and foregoing Response and Answer was furnished by HAND delivery to the following on this 15th day of June, 1981:

Office of the County Attorney
in and for Lee County, Florida
Attorneys for Petitioner
P.O. Box 398
Fort Myers, Florida 33902
Attention: Terry F. Lenick,
Assistant County Attorney

/s/ Hugh Paul Nuckolls
HUGH PAUL NUCKOLLS

/s/ Terry V. Broughton
TERRY V. BROUGHTON

RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA

Resolution No. 77-8-26

WHEREAS, Pursuant to due authorization, the Lee County Division of Transportation has had State Road 869 located and surveyed and has prepared an alignment for said road; and,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, that it hereby approves the location and survey of the alignment of S.R. 869, as shown on a map prepared by the Lee County Division of Transportation, known as a Map of Survey and Location of State Road 869, and the Board of County Commissioners directs that a copy of said map, certified by the Director of the Lee County Division of Transportation be filed in the office of the Clerk of the Circuit Court of Lee County; and

BE IT FURTHER RESOLVED that it is the judgment of the Board of County Commissioners of Lee County that the construction of said State Road 869 is necessary, practical and to the best interest of the county, and that it is necessary that the right-of-way for the roadbeds and borrow pits for said S.R. 869 be acquired in fee simple and a perpetual easement shall be acquired for Drainage Ditches; and the county is authorized to acquire the same by gift, purchase, or condemnation; and

BE IT FURTHER RESOLVED by the Board of County Commissioners that the County Attorney's office and the Division of Transportation are hereby authorized to secure by gift, purchase or condemnation the lands necessary for the right-of-way for the roadbed for said State Road 869 as shown on the official right-of-way map, together with any and all borrow pits and easements for drainage ditches that may hereafter be found and determined necessary in the construction and maintenance of State Road 869, said land to be free of legal and physical encumbrances.

THE FOREGOING RESOLUTION was offered by Commissioner Roberts who moved its adoption. The motion was seconded by Commissioner Steele and upon being put to a vote the vote was as follows:

R. DOUG TAYLOR	AYE
L. H. "BOB" WHAN	AYE
ROLAND Q. ROBERTS	AYE
BETTY B. EVANS	AYE
RICHARD L. STEELE	AYE

DULY PASSED AND ADOPTED by the Board of County Commissioners of Lee County, Florida, this 31st day of August, A. D. 1977.

ATTEST:
/s/ Sal Geraci
SAL GERACI, Clerk

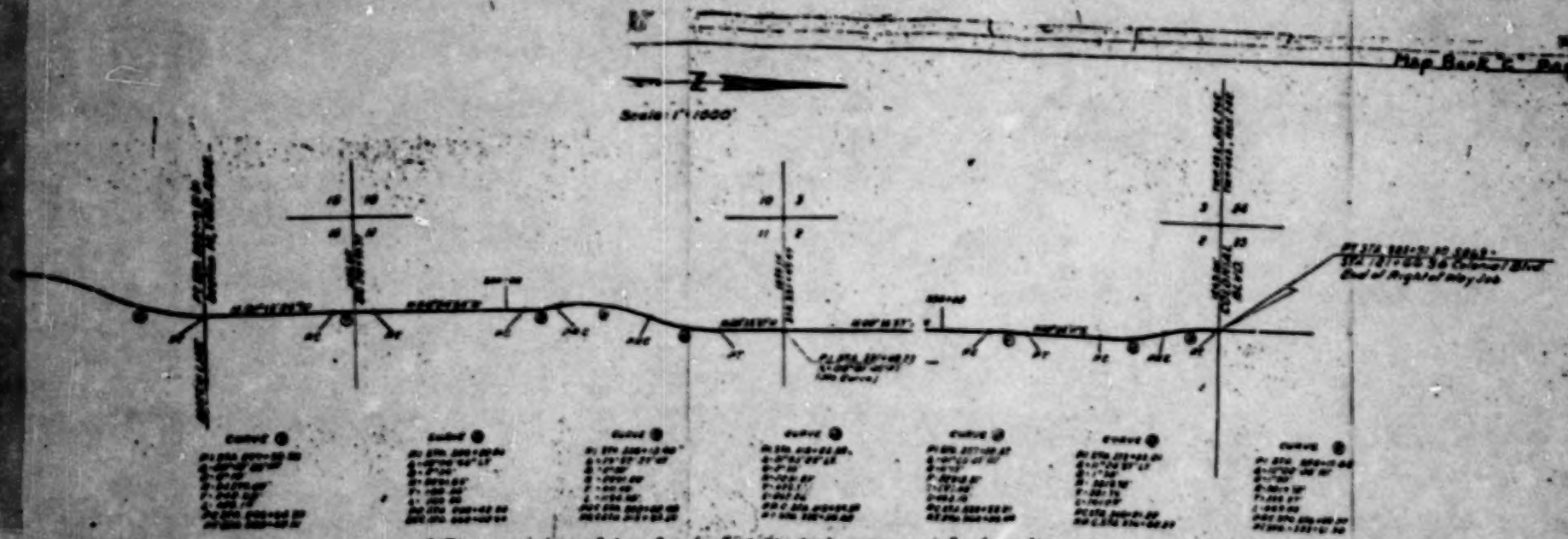
APPROVED AS TO FORM
& LEGAL SUFFICIENCY
/s/
Office of County Attorney

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

/s/ Betty Bowen Evans
BETTY BOWEN EVANS, Vice Chairman

MAP ATTACHED TO ANSWER AND RESPONSE OF DEFENDANTS (A PART OF EXHIBIT 1 THERETO) NOT INCLUDED.

SEE APPENDIX , WHICH IS DEFENDANTS' EX. 2 AT TRIAL OF CAUSE.



I Benjamin C. Pruitt, as Director of the Division of Transportation of Lee County, Florida, as hereby ... nify that this map is an official Map of Location and Survey of a portion S.R. 869 in Lee County, Florida; said portion of S. ... 869 extending from P.T. Sta 380+15.37 in Section 14, T.46 S., R.24 E. to P.T. Sta. 383+51.30 S.R. 869 - Sta 181+66.56 Colonial Blvd. and e... of Right of Way Job

Director of the Division of Transportation
County of Lee, State of Florida

Attest: Virginia L. Hunter

Filed for record in the office of the Clerk of the Circuit Court for the County of Lee, State of Florida, in Map Book "C", Page 10 on the 14th day of July A.D. 1977

RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA

Resolution No. 77-8-26

WHEREAS, Pursuant to due authorization, the Lee County Division of Transportation has had State Road 869 located and surveyed and has prepared an alignment for said road; and,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, that it hereby approves the location and survey of the alignment of S.R. 869, as shown on a map prepared by the Lee County Division of Transportation, known as a Map of Survey and Location of State Road 869, and the Board of County Commissioners directs that a copy of said map, certified by the Director of the Lee County Division of Transportation be filed in the office of the Clerk of the Circuit Court of Lee County; and

BE IT FURTHER RESOLVED that it is the judgment of the Board of County Commissioners of Lee County that the construction of said State Road 869 is necessary, practical and to the best interest of the county, and that it is necessary that the right-of-way for the roadbeds and borrow pits for said S.R. 869 be acquired in fee simple and a perpetual easement shall be acquired for Drainage Ditches; and the county is authorized to acquire the same by gift, purchase, or condemnation; and

BE IT FURTHER RESOLVED by the Board of County Commissioners that the County Attorney's office and the Division of Transportation are hereby authorized to secure by gift, purchase or condemnation the lands necessary for the right-of-way for the roadbed for said State Road 869 as shown on the official right-of-way map, together with any and all borrow pits and easements for drainage ditches that may hereafter be found and determined necessary in the construction and maintenance of State Road 869, said land to be free of legal and physical encumbrances.

THE FOREGOING RESOLUTION was offered by Commissioner Roberts who moved its adoption. The motion was seconded by Commissioner Steele and upon being put to a vote the vote was as follows:

R. DOUG TAYLOR	AYE
L. H. "BOB" WHAN	AYE
ROLAND Q. ROBERTS	AYE
BETTY B. EVANS	AYE
RICHARD L. STEELE	AYE

DULY PASSED AND ADOPTED by the Board of County Commissioners of Lee County, Florida, this 31st day of August, A. D. 1977.

ATTEST:
/s/ Sal Geraci
SAL GERACI, Clerk

APPROVED AS TO FORM
& LEGAL SUFFICIENCY
/s/
Office of County Attorney

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

/s/ Betty Bowen Evans
BETTY BOWEN EVANS, Vice Chairman

EXCERPTS FROM RESOLUTION PROVIDING FOR ISSUANCE OF BONDS TO CONSTRUCT CR 869 INTRODUCED AS AN EXHIBIT IN THE BOND VALIDATION PROCEEDINGS—DEFENDANTS' EX. NO. 3

RESOLUTION NO. 78-8-20

A RESOLUTION PROVIDING FOR THE ACQUISITION AND CONSTRUCTION OF CERTAIN CAPITAL PROJECTS OF LEE COUNTY, FLORIDA; PROVIDING FOR THE ISSUANCE OF NOT EXCEEDING $18,000,000 CAPITAL BONDS, SERIES 1978 OF SUCH COUNTY TO PAY THE COST OF SUCH PROJECTS; PROVIDING FOR THE RIGHTS OF THE HOLDERS OF SUCH BONDS; PROVIDING FOR THE PAYMENT THEREOF; AND MAKING CERTAIN OTHER COVENANTS AND AGREEMENTS IN CONNECTION WITH THE ISSUANCE OF SUCH BONDS.

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA:

SECTION 1. AUTHORITY FOR THIS RESOLUTION. This resolution is adopted pursuant to Chapter 125, Florida Statutes, as amended and supplemented, and Home Rule Ordinance No. 78-9 enacted by the County on May 31, 1978, and other applicable provisions of law.

SECTION 2. DEFINITIONS. The following terms shall have the following meanings herein, unless the text otherwise expressly requires:

* * * *

F. "Projects" shall mean the following county road projects together with any and all improvements, extensions and additions thereto and any additional capital projects hereafter constructed or acquired:

(1) County Road 869 from Colonial Boulevard south to Gladiolus Drive thence south and west to McGregor Boulevard in the vicinity of Shell Point Village will be 11.75 miles of 4-lane asphalt, limited access highway, on a 4-lane right-of-way.

* * * *

SECTION 3. FINDINGS. It is hereby ascertained, determined and declared that:

A. The Issuer is authorized to acquire, construct, operate, furnish, equip and improve the Projects and to finance the Projects; and the Issuer is further authorized to use its Non Ad Valorem Funds to pay the principal of and interest on its Obligations to finance the construction and acquisition of the Projects.

B. It is necessary and desirable to acquire and construct the Projects, as provided herein, in order to preserve and protect the public health, safety and welfare of the inhabitants of the Issuer.

* * * *

EXCERPT FROM DEFENDANTS' EX. NO. 3

(Testimony Of Mike Carroll, County Engineer For Lee County)

* * * *

[33] planning and construction of roads?

A. Well, I was employed by the Division of Highways in California. I spent three years in the Advanced Planning Department with District Seven in Los Angeles, which we used computer programming to generate traffic and design it to the streets and freeways system in the Los Angeles area. Since coming to the Fort Myers area, working with Duane Hall and Associates, I've worked on the design of major road improvements in Lee County, such as Fowler Street, Evans Avenue and some intersection improvements, such as College Parkway and McGregor Boulevard intersection.

Q. Mr. Carroll, have you previously been qualified as an expert witness in civil engineering pertaining to road construction in the Circuit Court of Lee County?

A. Yes, I have.

Q. Would you state briefly, those cases?

A. The City of Fort Myers for the Evans Avenue project and for Lee County on the South Fort Myers Sewer District and Fort Myers Beach Sewer District.

MR. YAEGER: Your Honor, at this time, I would like to tender Mr. Carroll as an expert in civil engineering as to road construction.

THE COURT: Mr. Russell, do you have any objection or any questions you'd like to ask Mr. Carroll?

MR. RUSSELL: Your Honor, I have no cross examina[34]tion or questions. As far as predicate, his expertise in the area and for the purpose of this hearing, would not object to his testifying as an expert in the area of engineering in regard to roads, et cetera.

THE COURT: Be so qualified.

MR. YAEGER: Thank you, Your Honor.

BY MR. YAEGER: (Cont'g.)

Q. Mr. Carroll, you've indicated your present duties with Lee County are as County Engineer?

A. Yes, sir.

Q. And in relation to your duties as County Engineer, are you familiar with the County Road system and network?

A. Yes, sir.

Q. With your duties as County Engineer, are you familiar with the County road projects described in Plaintiff's Exhibit 2, which is Bond Resolution Number 78-8-20?

A. Yes, I am.

Q. Could you explain to the Court what the general purpose of these projects are?

A. Yes. I brought along a map, we can refer to this. It shows the project and will help explain the purpose of it.

MR. YAEGER: May I have this marked for identification, Your Honor?

THE COURT: All right. Map will be marked Plaintiff's Exhibit number 12.

[35] BY MR. YAEGER: (Cont'g.)

Q. Mr. Carroll, did you prepare Plaintiff's Exhibit number 12 yourself?

A. I had the map prepared in our office here in the Courthouse. It's a map of—small scale map of Lee County on which we've shown the three projects that are included in this bond issue.

Q. Would you state briefly the general purpose of these road projects?

A. General purpose is to provide additional capacity for the movement of vehicles on our road system, ease traffic congestion.

Q. Okay. In general, what does Plaintiff's Exhibit 12 represent as far as the red lines indicated therein?

A. First red line which we have marked is three, is the first project in the bond issue. It is State Road or County Road 869. It begins at Colonial Boulevard, runs south to College Parkway then continues south across Cypress Lake Drive and south and then turns southwest to Galdiolus Drive, southwest and then to the west, crossing San Carlos Boulevard and intersecting McGregor Boulevard near the intersection of Shell Point Boulevard.

MR. RUSSELL: Your Honor, I would object or at least for purposes, I ask the Court to allow to see that. The Court is the one who has to make the decision.

1. DANIELS ROAD
   US 41 to I-75

2. ESTERO BLVD.
   CENTER ST. to BIG CARLOS P[illegible]SS

3. SR 869
   COLONIAL BLVD. to M[illegible] McGREGOR BLVD.

78-3080 CA
(81-1747)

T47S

LEE COUNTY

FLORIDA

Best Copy Available

Benjamin C. Pratt Was Called As A Witness For The Plaintiff. The Following Are Excerpts From His Testimony At The Trial Of The Cause, August 7, 1981.

* * * *

[64] MR. SIBLEY: We agree.

THE COURT: The Court accepts the witness as an expert in the field of civil engineering.

BY MR. LENICK:

Q. Are you familiar with the project known as County Road 869?

A. Yes.

Q. Would you describe the project?

A. Essentially, it is a four-lane divided highway beginning at Colonial Boulevard in the vicinity of the cemetery and proceeding south directly to Gladiolus Drive, thence going south and west across San Carlos Boulevard and joining McGregor Boulevard in the vicinity of Shell Point Village.

Q. Was there ever a study done on the necessity of having such a road?

A. Yes, there was.

This was the White Study.

Q. And as a result of that White Study, what occurred, sir?

A. The White Study covered then State Road 869 between Gladiolus and Colonial. There were two alignments considered. These were designated as the easterly and westerly alignment.

The westerly alignment was the one selected by the Board of County Commissioners and was the one recommended by [65] the White company.

Q. In your opinion, do you believe that such a northerly-southerly route known as 869 is reasonably necessary for this county?

A. Yes.

Q. What is the public purpose for this project?

A. McGregor Boulevard to the west of 869 and Tamiami Trail, US 41, to the east of State Road 869 are overloaded. And it is the thought to split traffic from those two arteries and relieve the traffic congestion in so doing and put these vehicles split from those two arteries onto 869.

Q. Mr. Pratt, are you familiar with the parcel in question?

A. Yes, I am.

Q. Are you familiar with the various alignments that were proposed?

A. Yes, sir.

Q. Are you familiar with Flood & Associates?

A. Yes, I am.

Q. How are you familiar with Flood & Associates in relationship to this project?

A. They were selected by competitive negotiation to design the plans for 869 going to the east of Tanglewood School.

Q. Are the plans which are submitted into evidence,

* * * *

[69]A. In my opinion, these were the three alignments, yes.

Q. With relationship with the alignment which went straight, relatively straight, which is the fourth alignment, which, in your opinion, in relationship to all four alignments—

Would you consider that Alignment No. 2 is a reasonable alignment?

A I don't want to tumble over the word "reasonable" here.

I stated to the Board my opinion, that it was not a feasible alignment but it was a doable alignment.

Q. When you say "feasible," what do you mean by "feasible," sir, as compared to "doable"?

A. Well, the definitions of "feasible" from Webster's Collegiate Dictionary are probable or likely. And as opposed to a straight-through alignment, these don't fit that category.

Q. So what you're saying is, the best alignment would be the straight-through alignment?

A. Yes, sir.

Q. If the best alignment is the straight-through alignment, what, in your opinion, is the second best alignment?

A. Alignment No. 2 up here.

Q. And that is a doable engineering-wise?

[70]A. Yes, sir.

Q. What's your definition of "doable"?

A. It could be built if you were not considering money or a host of other factors. It's a safe alignment.

Q. Is it engineeringly-wise safe insofar as any engineer standards that you know of?

A. Yes, it is. It's based on the minimum standards from the Florida Department of Transportation.

Q. On Alignment No. 2, would you note the property of the Defendants?

A. Shown in green.

Q. Based upon that alignment, do you believe that the property taken is reasonably necessary?

A. Based on the alignment, it is.

Q. Do you believe that a fee simple with a slope easement as requested is reasonably necessary?

A. Yes, I do.

MR. LENICK: I have no further questions at this time of this witness, Your Honor.

CROSS EXAMINATION

BY MR. SIBLEY:

Q. Mr. Pratt, the question we're here to determine today is whether or not it is necessary to have that curve in the road rather than a straight alignment.

MR. LENICK: I object to the—if counsel [71] wishes to ask him a question, I don't object to that, but not a narrative form of a closing argument.

THE COURT: I'll sustain, sir.

BY MR. SIBLEY:

Q. Is it necessary in constructing this road that this curve be placed in the road?

MR. LENICK: Your Honor, I object. That's general in nature. I don't understand even any relevancy of that question.

THE COURT: Overruled, sir.

THE WITNESS: From the standpoint of being a county employee and Director of Transportation and directed to build the road, that was—the curve was necessary.

From the standpoint of engineering, it is not necessary.

BY MR. SIBLEY:

Q. How much more will the road cost today because this curve was ordered by the County Commission?

A. I expect it will cost about two million dollars more.

Q. How, in order to render the curve, the road with the curve as safe as a road without the curve, what was it necessary for you to do reference to the speed limit?

A. It was necessary to reduce the speed limit from 55 miles per hour to 45 miles per hour and super-elevate the [72] curve.

Q. This curved road is unsafe at the speed of 55 miles an hour; that is correct, isn't it?

A. Yes, sir.

Q. These drawings made by Flood were under an order from the County Commission, wasn't it, to draw a road that would go east of the Tanglewood school; is that correct?

A. Yes, sir.

Q. They were not deciding what was the best route for this road. They were merely following the orders of their assignment; is that correct?

A. Yes, sir.

Q. Can you tell us, please, who the gentleman is that owned the land here on the first—

A. Mr. George Sanders owns that property.

Q. And one of the reasons this was not accepted was because it went too deep into his land?

A. We felt it would leave a portion of land—a large portion of land would not have any practicable—excuse me—practical use, and we would have to buy that land.

Q. Are you familiar with the plans for the construction of this road?

A. Yes, sir.

Q. I'm going to ask you to look at these plans and tell the Court how many entrances and exits are going to be on

* * * *

[76] hearsay.

THE COURT: Overruled.

MR. SIBLEY: Mr. Pratt reported he held meetings with nine other professional engineers in Lee County, reviewed the results of these meetings, and these engineers affirmed the

adopted alignment of Daniels Road and Gladiolus Road were proper and should not be revised.

BY MR. SIBLEY:

Q. Do you remember—

A. Yes. I think those are other roads, though.

Q. This goes on Gladiolus, doesn't it?

MR. LENICK: Let the witness speak, Your Honor.

THE WITNESS: I think I can answer the question. Could I see what you have there? It think it's—

BY MR. SIBLEY:

Q. Yes.

A. Okay. It—yes. We affirmed that the adopted alignments of several roads of which SR 869 was one, was proper and should not be revised.

The Florida Department of Transportation made the original design on the road, however.

Q. But you did consult nine engineers when the problem arose to determine whether or not the alignment that is initially adopted by the Department of Transportation should not be revised?

[77]A. Yes, sir.

Q. They affirmed your position?

A. Yes, sir.

Q. How were you going to let the children cross that road with straight alignment?

A. There was a pedestrian walkover for the children.

Q. How are you going to protect the children on the curve?

A. There are two walkovers programmed on the curve. As the area develops, they will be installed.

On the original project, that walkover would have gone in initially with the first construction.

Q. So the same device of safety was to be utilized on both roads; is that right?

A. Yes, sir.

Q. In the road that comes out, I think you say, at—looks like around 334. I believe that's it.

Will you take a look at that entrance, please, that road on the plans there?

A. Yes, sir.

Q. And what size road does that indicate is coming off of the curve?

A. From the—essentially from the east there will be a 70-foot wide roadway, and from the west at the school would be about 25 feet.

[78]Q. So the road going east is indicated as a 70-foot roadway to be put in; is that correct?

A. That's correct.

Q. That's the roadway that enters Mr. Sanders' property?

A. Yes, sir.

Q. Mr. Pratt, you are the designated representative of the County here today; is that correct?

A. Yes, sir.

Q. And you, as such designated representative, have given a deposition in this cause?

A. Yes, sir.

Q. And you're familiar with that deposition, aren't you?

A. Yes, sir.

MR. SIBLEY: I think that's all.

THE COURT: Anything else?

MR. LENICK: I have a few questions on redirect.

THE COURT: Will this be extensive or literally a few questions?

MR. LENICK: I don't anticipate it being very extensive.

REDIRECT EXAMINATION

BY MR. LENICK:

* * * *

RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA

Resolution No. 80-7-5

WHEREAS, pursuant to due authorization, the Lee County Division of Transportation has had County Road 869 located and surveyed and has prepared an alignment for said road from Canal L of the IDD System easterly around the Tanglewood School to Colonial Boulevard; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida held a public hearing on July 9, 1980 to consider approving said alignment; and,

WHEREAS, after hearing from all concerned persons at said public hearing, it is the desire of the Board to approve said alignment;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, that it hereby approves the alignment of County Road 869 from Canal L of the IDD System easterly around the Tanglewood School to Colonial Boulevard, as shown on the map prepared by the Lee County Division of Transportation, and approves the location and the survey of the alignment as shown on the map of Survey and Location of County Road 869, which map supersedes that portion of the official map of Location and Survey of a portion of S.R. 869 between P.C. Sta. 298 + 42.54 north of Canal L and P.T. Sta. 383 + 51.30 at Colonial Boulevard as recorded in Map Book "C", page 10 on the 14th day of July A.D. 1977, and the Board of County Commissioners directs that a copy of said map, certified by the Director of the Lee County Division of Transportation be filed in the office of the Clerk of the Circuit Court of Lee County; and,

BE IT FURTHER RESOLVED that it is the judgment of the Board of County Commissioners of Lee County that the construction of said County Road 869 is necessary, practical

and to the best interest of the county, and that it is necessary that the right-of-way for the road beds and borrow pits for said C.R. 869 be acquired in fee simple and perpetual ease ment shall be acquired for Drainage Ditches; and the county is authorized to acquire the same by gifts, purchase, or condemnation; and,

BE IT FURTHER RESOLVED by the Board of County Commissioners that the County Attorney's Office and the Division of Transportation are hereby authorized to secure by gift, purchase or condemnation the lands necessary for the right-of-way for the roadbed for said County Road 869 as shown on the official right-of-way map, together with any and all borrow pits and easements for drainage ditches that may hereafter be found and determined necessary in the construction and maintenance of County Road 869, said land to be free of legal and physical encumbrances.

THE FOREGOING RESOLUTION was offered by Commissioner Rodda, who moved its adoption. The motion was seconded by Commissioner Taylor, and upon being put to a vote, the vote was as follows:

R. DOUG TAYLOR	AYE
HARRY RODDA	AYE
ROLAND Q. ROBERTS	AYE
WADE SCAFFE	AYE
RICHARD L. STEELE	AYE

DULY PASSED AND ADOPTED by the Board of County Commissioners of Lee County, Florida, this 9th day of July, A.D. 1980.

ATTEST:
SAL GERACI, CLERK

/s/ _____
Deputy Clerk

APPROVED AS TO FORM

/s/ _____
OFFICE OF COUNTY ATTORNEY

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY FLORIDA

/s/ R. L. Steele
R. L. STEELE
Chairman

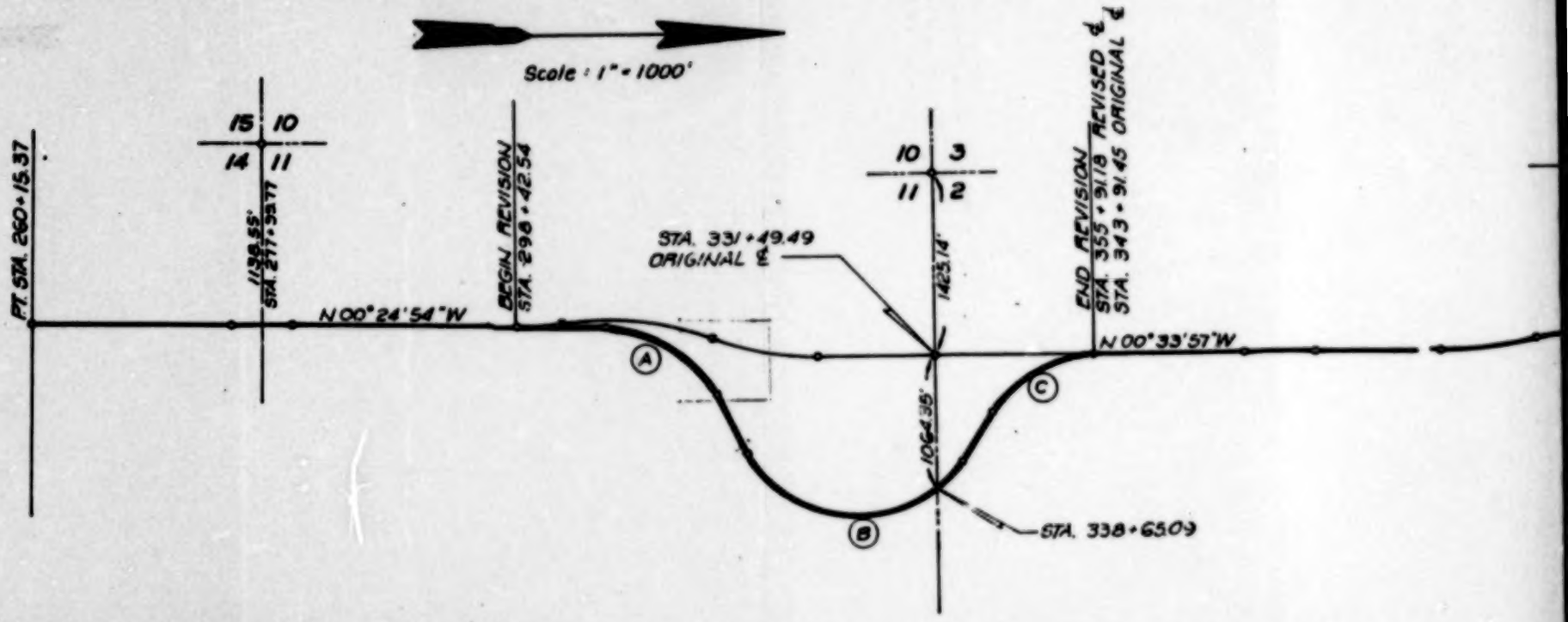
State of Florida
County of Lee

I, Sal Geraci, Clerk of the Circuit Court in and for said County and State do hereby certify that the ? ? ? ? ? ? ? ? ? an excerpt of the Minutes of the ? ? ? ? ? ? ? as appears in Minute Book 99, pages 21, 22, 22-A and 22-B under date of 7/9/??.

Givenunder my ? ? ? ? day of June A.D. 1981.

SAL GERACI, Clerk

By Lois Kurtz D.C.



enjamin C. Pratt, as Director of the Division of Transportation
blic Works, of Lee County, Florida, do hereby certify that this map
official Map of Location and Survey of a revised portion of
Road 869 in Lee County, Florida; said portion of C.R. 869
ing from P.C. Sta. 298+42.54 of the original centerline which
same Sta. for the revised centerline, in Sec. 11, Twp. 45 S, Rge. 24 E.
343+91.45 on the original centerline which is the P.T. Sta.
91.18 of the revised centerline in Sec. 2, Twp. 45 S, Rge. 24 E. This
line is a revision to the original centerline as shown in
ook "C", Page 10.

CURVE (A)
Δ = 63°30' RT.
D = 6°00
R = 954.93'
T = 590.93'
L = 1058.33'
PI Sta 311+38.17
PC Sta 305+47.24
PT Sta 316+05.57

CURVE (B)
Δ = 122°00' LT.
D = 6°00'
R = 954.93'
T = 1722.74'
L = 2033.33'
PI Sta 338+58.98
PC Sta 321+36.24
PT Sta 341+69.57

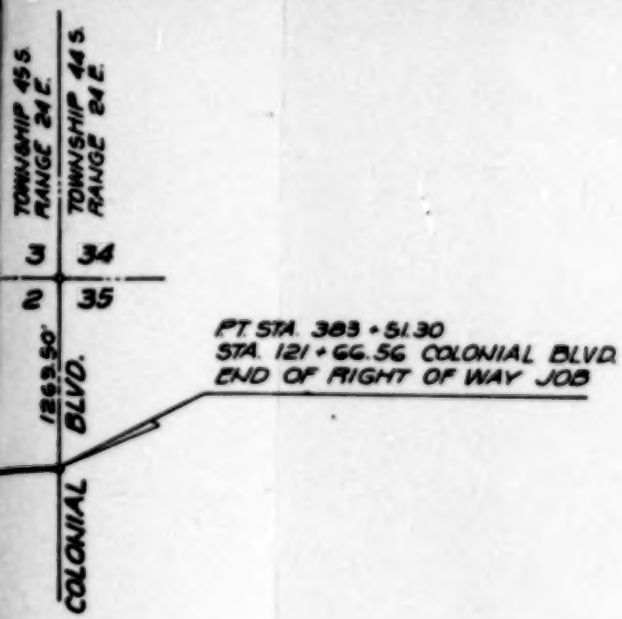
CURVE (C)
Δ = 58°20'57" RT.
D = 6°00'
R = 954.93'
T = 531.57'
L = 972.49'
PI Sta 351+50.26
PC Sta 346+18.70
PT Sta 355+91.18 ORIGINAL ℄
= 343+91.45 REVISED ℄

Benjamin C. Pratt

Director of the Division of Transportation and Public Works
Lee County, Florida

Attest: Jane Tolpin

Map Book "C" page 15



Filed for record in the office of the Clerk of the Circuit Court for the County of Lee, State of Florida, in Map Book C, Page 15 on the 15th day of July A.D. 1980

Sal Geraci by Paci Kurtz D.C.
Clerk of the Circuit Court
Lee County, Florida

7-9-80

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Case No. 81-1821

HORIZONS APARTMENTS ASSOCIATES, LTD., AND CAL KOVENS,

Appellants,

v.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellee.

FEB 10 1982

In The District Court Of Appeal Of Florida Second District

Opinion filed February 17, 1982.

Appeal from nonfinal order of the Circuit Court for Lee County; Robert T. Shafer, Judge.

Hugh Paul Nuckolls of Nuckolls, Johnson & Fernandez, Fort Myers; and John R. Farrell, Miami; and Marion E. Sibley of Sibley, Giblin, Levenson & Glaser, Miami Beach, for Appellants.

Terry F. Lenick, County Attorney's Office, Fort Myers, for Appellee.

PER CURIAM.

Affirmed.

SCHEB, C. J., and HOBSON and DANAHY, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

Case No. 81-1821

HORIZONS APARTMENTS ASSOCIATES, LTD.,
AND CAL KOVENS,

Appellants,

v.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellee.

MOTION FOR REHEARING OF APPELLANTS

COME NOW the Appellants, HORIZON APARTMENTS ASSOCIATES LTD., and CAL KOVENS, pursuant to Florida Rules of Appellate Procedure 9.330, and move the District Court of Appeal of Florida, Second District, to rehear and/or reconsider its per curiam decision rendered herein on February 17, 1982.

The essential facts of this case are identical with the facts of the case of *Pirman* v. *Florida State Improvement Commission, 78 So. 2d 718 (Fla., 1955).* In that case the Supreme Court of Florida squarely held:

> "[3] The Board of County Commissioners may, however, describe the road or locate the road prior to validation and issuance of the bonds, and when that is done, the Board will not be permitted to deviate from the location as established."

The affirmance of the trial court in this case is a decision directly in conflict with the holding and decision in the *Pirman case, supra.* Consequently, the District Court of Appeal of Florida, Second District, through the affirmance of the trial court merely by the use of one word, "affirmed," has unintentionally but effectively denied the Appellant due proc-

ess and equal protection of law because by the use of that one word. *Jenkins* v. *State, 385 So. 2d 1356 (Fla. 1980)* and *Dodi Publishing Company* v. *Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980)*, destroyed the Appellant's right to present its case to the Supreme Court of Florida under applicable constitutional provisions conferring Supreme Court conflict jurisdiction. Thus, the District Court of Appeal of Florida, Second District, by State action, has denied to the Appellant due process of law and equal protection of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

GROUND I.

The District Court of Appeal, Second District, in its decision in the above entitled cause overlooked and failed to consider that when an avenue of appeal or appellate review has been extended under limited circumstances by the Constitution of the State of Florida, this limited right "cannot be granted to some litigants and capriciously and arbitrarily denied to others without violating the equal protection clause" of the Constitution of the United States. *Lindsey* v. *Normet, 405 U.S. 59, 92 S.Ct. 862, 876 (1971)*. Thus, destruction of Appellant's right to seek and procure a review of the decision of the District Court of Appeal, Second District, upon the ground of conflict jurisdiction by simply using the word "affirmed," rather than recognizing and treating in said decision with the direct conflict between the Circuit Court decision and the decision of the Supreme Court of Florida on the same question of law in the case of *Pierman* v. *Florida State Improvement Commission, supra*, constitutes State action, which can be utilized to grant to some litigants and capriciously or arbitrarily deny to others the right of review in violation of the equal protection clause of the Constitution of the United States. Such action "is to be regarded as action of the State within the meaning of the Fourteenth Amendment." See, *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill, 281 U.S. 673, 50 S.Ct. 451*, and *Shelley* v. *Kraemer, 334 U.S. 1, 68 S.Ct. 836*. And, the Constitution of

Florida, Article V. Section 3(b)(3), grants to this Appellant the right to present for review to the Supreme Court of Florida "any decision of the District Court of Appeal that expressly and directly conflicts with a decision . . . of the Supreme Court on the same question of law." Such right under such circumstances is a part of the appellate due process of law.

GROUND II.

The District Court of Appeal, Second District, overlooked and failed to consider that where the right of appeal or appellate review has been extended under limited circumstances by the Constitution of the State of Florida, "there may not be imposed upon it discriminatory limitations which violate the right of the equal protection of the law" under the provisions of the Fourteenth Amendment to the Constitution of the United States. Thus, the destruction of Appellant's right to seek and procure review of a decision of the District Court of Appeal, Second District, upon the ground of conflict jurisdiction by simply using the word "affirmed" rather than recognizing and treating with the direct conflict between the Circuit Court decision and the decision of the Supreme Court of Florida on the same question of law in the case of *Pirman* v. *Florida State Improvement Commission*, *supra*, constitutes State action imposing a discriminatory limitation upon the Appellant's right, as aforesaid, in violation of the equal protection clause of the Constitution of the United States, Article XIV, Section 1.

WHEREFORE, the Appellant respectfully moves and urges that this Court reconsider and recall the "Per Curiam Affirmed" opinion, issued herein, substituting therefor this

Court's express decision upon the merits of the matters sub judice.

Respectfully submitted,

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/s/ Marion E. Sibley
MARION E. SIBLEY, ESQ.

/s/ Hugh Paul Nuckolls
HUGH PAUL NUCKOLLS, ESQ.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA
APRIL 16, 1982

Case No. 81-1821

HORIZONS APARTMENTS ASSOCIATES, LTD., AND CAL KOVENS,

Appellants,

v.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellee.

April 16, 1982

Counsel for appellants having filed a motion for rehearing in the above-styled cause, upon consideration, it is

ORDERED that said motion is hereby denied. It is further

ORDERED that motion for oral argument is denied,

A TRUE COPY
TEST:

/s/ William A. Haddad
WILLIAM A. HADDAD
Clerk District Court of Appeal
Second District

cc: Hugh Paul Nuckolls
John R. Farrell
Marion E. Sibley
Terry F. Lenick

IN THE SUPREME COURT OF FLORIDA
TUESDAY, MAY 18, 1982

Case No. 62,070

HORIZONS APARTMENTS ASSOCIATES, LTD., AND CAL KOVENS,

Petitioners,

v.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Respondent.

District Court Of Appeal, 2d District—No. 81-1821

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins* v. *State*, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

/s/ Debbie Causseaux
DEBBIE CASSEAUX
Deputy Clerk

cc: Hon. William A. Haddad, Clerk
Hon. Sal Geraci, Esquire
Hon. Robert T. Shafer, Jr., Judge

Marion E. Sibley, Esquire
of Sibley, Giblin, Levenson & Glaser
Nuckolls, Johnson & Fernandez
John R. Farrell, Esquire
Terry F. Lenick, Esquire

ERNEST J. PIRMAN *et al.*, *Appellants*,

v.

FLORIDA STATE IMPROVEMENT COMMISSION,
and State Road Department of Florida, *Appellees*.

Supreme Court of Florida.

En Banc.

Feb. 16, 1955.

Rehearing Denied March 4, 1955.

Proceeding by property owners attacking determination of administrative authority vested with power to designate location of certain road, relative to location of a bridge in connection with such road. The Circuit Court, Leon County, W. May Walker, J., dismissed complaint and plaintiffs appealed. The Supreme Court, Mathews, C.J., held that where bridge was to be erected across bay from east to west, riparian owners on north shore of bay, who did not own any property to be acquired in building of such bridge, were without right to compensation for violation of property rights.

Affirmed.

Mabry, Reaves, Carlton, Fields & Ward, Tampa, for appellants.

J. Turner Butler, Jacksonville, Ford L. Thompson, Tallahassee, and Dewey A. Dye, Bradenton, for Florida State Improvement Commission.

Ross H. Stanton, Jr., Tallahassee, for State Road Department of Florida.

MATHEWS, Chief Justice.

This is another example of taxpayers and property owners attempting to substitute their judgment or have the Court substitute its judgment for that of the constituted authorities vested with the power to designate the location of a road.

[1] The selection of locations for public improvements has caused more delay in constructing such public improvements than any other cause. This is especially true with reference to roads and bridges. It is impossible to select a site or location for a major road or bridge which will satisfy the desires of all the citizens and taxpayers. The discretion to make such selections is generally vested in administrative boards, or the location itself is fixed by the Legislature. There is no constitutional provision which requires that the location of a road or bridge should be fixed by the Legislature or by the administrative board with such certainty that it can be located by a surveyor as a prerequisite to the issuance of bonds or the validation of such bonds.

The appellants in this case own some property which would be benefited materially if the constituted authorities would construct a road around Palma Sola Bay instead of across or over the Bay. The real question in which appellants are interested is stated in their brief where they state: "Indeed, plaintiffs would be glad to see the proposed new highway connecting Anna Maria Island with Bradenton constructed if it ran around Palma Sola Bay on the north rather than through it, and if, instead of widening Manatee Avenue, one-way streets were used."

Chapter 22700, General Laws of Florida, 1945, names, designates and establishes a state road, forming a part of the system of state roads of the State of Florida, a road in Manatee County described as follows:

> "Commencing at or near the NW corner of the SW¼ of Section 30, Township 34 South, Range 17 East, the said point being at the westerly end of Manatee Avenue (Present State Road No. 18) near the westerly (sic) shore of Palma Sola Bay; thence running in a generally westerly direction for a distance of 3.9 miles more or less to a junction with Anna Maria Road (Present State Road No. 18-A) on Anna Maria Key, latter said point of junction being at or near the SE corner of the SW¼ of the SW¼ of

the SW¼ of Fractional Section 28, Township 34 South, Range 16 East."

After much discussion and agitation, sentiment crystallized for the construction of what is now called the Manatee County Bridge Project. The bridge in question over Palma Sola Bay is only a portion of the project and this particular bridge and its approaches is the part of the project now under attack.

The description of the Palma Sola Bridge contained in the resolutions authorizing the lease-purchase agreement of the State Improvement Commission and the State Road Department of the State of Florida at the request of the Board of County Commissioners of Manatee County is as follows:

> "a) Palma Sola Bridge, described as a two-lane bridge with movable span over Sarasota Pass (Intracoastal Waterway), and causeways, bridge and road approaches from State Road 684 (G1A) on Anna Maria Island to a westerly extension of Manatee Avenue on the mainland east of Palma Sola Bay, together with necessary roadway connections between Palma Sola Bay and downtown Bradenton."

This description is a more definite description than that contained in Chapter 22700, General Laws of Florida 1945, and is contained within the general description set forth in said Act.

The appellants contend that the description set forth in Chapter 22700, General Laws of Florida 1945, and in the resolutions above mentioned, was so indefinite that the actual location could not be determined by a surveyor and, therefore, said Act and the resolutions above mentioned were null and void and that the determination of administrative authorities to build a bridge and make the connecting approaches in question was capricious and arbitrary. There is no merit to these contentions.

[2] A bridge and its approaches are parts of a road. Section 341.09, F.S., F.S.A., is simply declaratory of what has always

been considered to be a road or part of a road. That section reads as follows:

> "The terms 'road' and 'roads' as used in this chapter shall be construed to mean and include all highways and ways for public travel, including means for crossing streams by ways of bridges or ferries, under the jurisdiction of the several boards of county commissioners, or boards of bond trustees of the several counties or subdivisions thereof, of this state, or upon which such boards may expend any public money or cause work to be done, or any roads that may by this or any other law be placed under the supervision and control of the state road department."

Section 341.63(3), F.S., F.S.A., vests power in the State Road Department to make any project, or part thereof, a state road, or a part thereof. Section 341.47, F.S., F.S.A., vests power and authority in the State Road Department to determine and fix lines and locations of roads. Section 341.81, F.S., F.S.A., provides that all routes that may be hereafter approved, designated, dedicated and constructed by the State Road Department are designated and declared to be parts of the State Highway System of Roads.

Chapter 22700, General Laws of Florida 1945, must be construed in connection with the above sections of the law and it is very clear that the Legislature has vested in administrative boards, created by it, the power and authority to take every action taken in establishing and designating the location of all parts of the project known as the "Manatee County Bridge Project," which includes the "Palma Sola Bridge," as described in the resolutions of the Improvement Commission, the State Road Department, the Board of County Commissioners, and the validation petition. *Lewis* v. *Leon County*, 91 Fla. 118, 107 So. 146; *Morrison* v. *Farnell*, 126 Fla. 385, 171 So. 528; *Orange County* v. *Fordham*, 160 Fla. 259, 34 So.2d 438; *State* v. *Florida Improvement Commission, Fla.*, 75 So.2d 1, and *Webb* v. *Hill*, Fla., 75 So.2d 596.

The power of county commissioners to issue county bonds for the construction of county roads is provided for by Chapter 130, F.S., F.S.A., and may be compared with the power conferred upon the duly created administrative boards involved in this case. There is no requirement in the statutes or the Constitution that the location of such roads should be fixed and established prior to the validation or issuance of bonds. So as far as the Constitution and the statutes are concerned, the resolution may provide for county roads generally and after the validation and issuance of the bonds, the county commissioners may then determine the location of the roads to be constructed.

[3] The board of county commissioners may, however, describe the road or locate the road prior to the validation and issuance of the bonds and when that is done, the board will not be permitted to deviate from the location as established. In the case of *Whitner* v. *Woodruff*, 68 Fla. 465, 67 So. 110, prior to the bond election and issuance of the bonds, the County Commissioners designated a certain street in Sanford to be improved from the proceeds of a portion of the bonds. After the bonds had been issued, the County Commissioners decided to change the location of the improvement by changing to another street. A suit was brought to enjoin such change or deviation. The lower court approved the changed location but this Court reversed the lower court and held that such change or deviation could not be made after the bonds had been approved and issued.

In this case the bill of complaint showed that the bonds had been validated and further showed that a portion of the proceeds were to be used for a *bridge*, with movable span over Sarasota Pass, and causeways, bridge and road approaches from State Road 684 on Anna Maria Island to a westerly extension of Manatee Avenue on the mainland east of Palma Sola Bay, together with necessary roadway connections between Palma Sola Bay and downtown Bradenton. The bill of complaint specifically refers to the validating decree of said bonds in the case of *State* v. *Florida State Improvement Com-*

mission, Fla., 72 So.2d 28. These bonds are now ready to be sold. The transcript of record in the above case has been made a part of the record in this case. The appellants in this case are bound by the final decree of validation relating to the description and location of the bridge over Palma Sola Bay, together with the necessary roadway connections and approaches as set forth in *State* v. *Florida State Improvement Commission, supra.*

The rule nisi in the bond validation proceeding required all persons to appear on the 19th day of January, 1954. The appellants contend they did not know that it was intended to build a causeway and bridge across Palma Sola Bay instead of around the Bay until July 26, 1954. Yet, the validation petition, which was a part of the validation proceeding was made a part of the record in this case by the appellants, contained the description of the "Palma Sola Bridge" here above set forth, and also the following:

> "Provided, however, that said toll bridges (Palma Sola Bridge and Cortez Bridge) described in (a) and (b) above, and said Longboat-Anna Maria Bridge, described in (c) above, being essential to the production of tolls from said two toll bridges, shall be completed substantially in accordance with plans and specifications for said bridges filed with the Department prior to the issuance of bonds to finance the construction of said bridges."

The fact that the War Department of the United States may have guaranteed a permit to take care of the needs of navigation different from the ideas and desires of the appellants is of no consequence in this proceeding.

[4] All proceedings providing for the bridge and causeways across Palma Sola Bay appear to have been taken by the lawfully constituted boards authorized by law to take such proceedings. There is no fact alleged to show that the proceedings taken were arbitrary or capricious, and the appellants have no right to substitute their judgment for that of the lawfully created boards in question, and this Court has no authority to substitute its judgment and discretion for that of

such boards. For this Court at this late date to authorize a change in location as now fixed and established for a bridge over Palma Sola Bay to a road around the north of the Bay would constitute a deviation and departure from the location as established and would make it necessary to undo everything which has been done and to start all over again. This Court has no such power.

It is next contended by the appellants that running the road through Palma Sola Bay and the construction of the causeways and bridge violates the property rights of the appellants owning riparian property on Palma Sola Bay north of the crossing.

[5] The bill of complaint shows that the appellants do not own any of the property which must be acquired in building the bridge, approaches and causeways. It does show that they are riparian owners on the Bay north of the crossing but none of their property is taken. This Court settled this question contrary to contention of the appellants in the case of *Duval Engineering & Contracting Co.* v. *Sales, Fla.*, 77 So.2d 431, written by Mr. Justice Terrell.

We have carefully considered each and every contention of the appellants and they are without merit. The Chancellor was correct in granting the motion to dismiss the bill of complaint as amended.

Affirmed.

THOMAS, ROBERTS and DREW, JJ., concur.

TERRELL, J., agrees to the judgment of affirmance.